

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
ROBERT Q. GILLESPIE**

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Petitioners
Robert Q. Gillespie
Anthony Walker
William Krozack
Donald W. Rohrbaugh
Gerald H. Henning
Glenn Reynolds
James H. Pugh, III
For the Petitioner

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BOA Case No. S-2778
(OZAH No. 11-01)

Carrie Laurencot
Robert Shoemaker
Wayne Six
Charles Grimsley
Delores Milmoie
Kay W. Poch
Anne Cinque
Caroline Taylor
Ellen Pearl
Anne Sturm
Linda Pepe
Nancy Johnson Rattie
Ronald Conley

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Opposing the Application

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Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. FACTUAL BACKGROUND

Robert Q. Gillespie (Petitioner) seeks a special exception to operate a “private airstrip, associated with a farm” under Section 59-G-2.00.4 of the Montgomery County Zoning Ordinance, which he filed on June 30, 2010. On August 5, 2010, the Board of Appeals issued its Notice of Public Hearing, setting the hearing date for December 10, 2010. Ex. 13(b). Solely for the purposes of understanding the basis for the recommendation set forth herein, an aerial photograph (Exhibit 28, Attachment A-2) showing the location of the proposed use and surrounding properties is set forth on the next page.

Technical Staff recommended approval of the petition subject to four conditions, namely:

1. Use of the proposed airstrip will be limited to two round trips per week.
2. The airstrip will be used only in daylight hours and only in clear weather conditions.
3. No equipment or signage can be installed on the farm to accommodate the airstrip. The mowed grass airstrip shall remain in its current location and be maintained in its present natural condition.
4. The applicant must comply with all conditions of approval from the Maryland Aviation Administration (MAA) and the Federal Aviation Administration (FAA) for the subject airstrip use. Ex. 28.

Not all M-NCPPC divisions supported the petition. The Environmental Planning Division recommended denial of the application, finding that use of the airstrip would exceed the maximum permissible noise levels established by the Montgomery County Code. *See, Montgomery County Code*, §31B-1, *et. seq.* Exhibit 28, Attachment B-2. The Vision Division Staff concluded that the airstrip was inconsistent with the applicable master plan (the Agricultural and Rural Open Space Master Plan or the “AROS” plan).



According to Vision Division Staff, the AROS plan recommended that non-farmland uses of RDT property support “the critical mass” of agricultural use. Exhibit 28, Attachment B-3. It also determined the proposed airstrip to be incompatible with surrounding homes and the Bucklodge Forest Conservation Park (immediately across Peach Tree Road) due to the noise levels generated at take-off and landing. Exhibit 28, Attachment B-3. According to their report, Staff noted that citizens were concerned that the phrase, “airstrip associated with a farm” (undefined in the Zoning Ordinance) could be interpreted to include recreational airstrips, thus yielding the possible unintended proliferation of recreational airstrips in the Agricultural Preserve. Vision

Division Staff concluded the Zoning Ordinance was ambiguous as to whether private recreational airstrips that did not support agriculture were permitted. As a result, Vision Division Staff recommended further defining the use through a zoning text amendment. Exhibit 28, Attachment B-3.

The Development Review Division disagreed with the recommendation of the Environment Planning and Vision Division Staff. It concluded that, legally, the phrase “airstrip associated with a farm” did permit recreational use because it was used in the title of a Zoning Ordinance section and not the text of the ordinance itself. Exhibit 28, p. 2. Division Staff also determined that the use did *not* have to meet the noise levels set in the County Code because there was nothing in the Zoning Ordinance requiring the noise levels to be met. Staff also found that the impact of the noise was minimal, i.e., “no louder than weed whackers, lawn mowers and other machinery used on farms” and limited by the maximum of two trips permitted per week. Finally, Development Review Staff voiced a concern that airstrips in the RDT might be rendered “infeasible” if the Code noise levels were applied at take-off and landing. Exhibit 28, p. 2. Addressing the Vision Division’s differing view, the Development Review Division found that the use *was* compatible with agricultural uses in the RDT zone because it was grass and could easily be returned to agricultural use. Exhibit 28, p. 2.

On December 6, 2010, the Montgomery County Planning Board transmitted its recommendation to approve the petition, subject to the modification of certain conditions contained in the Technical Staff Report and two additional conditions:

1. The applicant must comply with all the requirements of Section 59-G-2.00.4.

2. Use of the proposed airstrip will be limited to no more than two round trips per week.
3. The airstrip shall be used only during daylight hours—between 7 a.m. and 9:00 p.m. on weekdays and between 9:00 a.m. and 9:00 p.m. on weekends – and only in clear weather conditions.
4. No equipment or signage can be installed on the farm to accommodate the airstrip. The mowed grass airstrip shall remain in its current location and be maintained in its present natural condition.
5. The applicant must comply with all conditions of approval from the Maryland Aviation Administration (MAA) and the Federal Aviation Administration (FAA) for the subject airstrip use. The special exception is conditional upon continued compliance with MAA and FAA regulations. In the event that either the MAA or the FAA rescinds its approval, the special exception approval shall be revoked.
6. Before the special exception can be approved, the applicant must obtain a waiver from the residential noise standards in Chapter 31 of the Montgomery County Code from the Montgomery County Department of Environmental Protection. Exhibit 34.¹

On December 1, 2010, the Sugarloaf Citizens Association notified the Examiner that it intended to participate in the case. Exhibit 31. The day prior to the scheduled hearing, the Hearing Examiner received a request to postpone the December 10, 2010, hearing date from adjoining neighbors, Ms. Carolyn Laurencot and Mr. Robert Shoemaker, to permit them to obtain legal representation. Exhibit 47. The Hearing Examiner denied the motion to postpone and the December 10, 2010, hearing proceeded as scheduled. Ms. Laurencot and Mr. Shoemaker were represented by counsel at the hearing.

¹ Subsequently, the Chairperson of the Planning Board submitted a letter requesting the Hearing Examiner to review whether federal preemption of aircraft regulation precluded the Board's conditions limiting the frequency and times of flights. Exhibit 89.

Having failed to conclude at the December 10th hearing, the case was continued to January 10, 2011, with counsel for the opposition agreeing to submit a pre-hearing statement by December 27, 2011. T. 207-208. The Hearing Examiner informed the parties of their option to reset the date by written request to the Hearing Examiner. T. 208-209.

The relative calm among the parties was short-lived. On December 28, 2010, Petitioner filed a request to postpone the January 10, 2011, hearing alleging that he did not timely receive the opposition's pre-hearing statement. Exhibit 64. After initially opposing Petitioner's postponement request (Exhibit 68(a)), Mr. Shoemaker and Ms. Laurencot (through counsel) agreed to postpone the hearing to February 18, 2011. Notice of the rescheduled hearing was issued by the Board on January 5, 2011. Exhibit 69.

Shortly thereafter, Mr. Shoemaker and Ms. Laurencot submitted into the record a zoning text amendment (ZTA No. 10-15), introduced by the County Council on December 12, 2010. Exhibit 75(b). The purpose of the amendment, as stated in the ordinance, was to "clarify that airstrips allowed in agricultural zones must be associated with farming operations" and to "provide an amortization period for certain approved airstrip special exceptions". The ZTA as introduced changed the description of the use in §59-C-9.3 (permitted uses in the RDT) from "Airstrip, associated with a farm" to "Airstrip, associated with farming operations". It also added a condition to the special exception standards in §59-G-2.00.4 requiring that, "[T]he aircraft using the airstrip must aid farming operations." Finally, ZTA 10-15 added a footnote to the land use table in §59-C-9.23 providing that, "[A]ny approved special exception for an 'airstrip associated

with farm [sic]' but not associated with farming operations must cease operation before {6 months after effective date}." Exhibit 75(b).

In anticipation of the February 18th public hearing, Petitioner submitted his Supplemental Pre-Hearing Statement identifying additional expert witnesses to be called in the case. Exhibit 85.

The hearing continued as scheduled on February 18, 2011. At the public hearing, Petitioner submitted a legal memorandum asserting that (1) federal aviation law preempted application of local noise ordinances to airstrips, (2) the Petitioner *could voluntarily* limit the number and time of flights on the airstrip even though the County would be prohibited from imposing the condition without his consent, (3) the then-existing language in the Zoning Ordinance did permit a recreational airstrip on a farm, (4) the proposed use complied with the AROS plan, (5) the proposed use would have no adverse impact on neighboring properties, (6) there were no non-inherent adverse effects of the proposed use, and (7) that the Petitioner's property was uniquely well-suited for the use. Exhibit 124.

The public hearing concluded on February 18, 2011, however, the record was kept open until March 21, 2011, to provide an opportunity for opposing parties to respond to the legal arguments raised in Petitioner's memorandum and for Petitioner to comment on the opponents' submissions. T. 295-296 (February 18, 2011).

After the hearing, but while the record remained open, opposing counsel submitted into the record Zoning Text Amendment No. 10-15, which had been adopted by the District Council on March 8, 2011. Exhibit 119(b). As adopted, ZTA No. 10-15 limited private airstrips in the RDT Zone to those aiding farming operations and required

that any airstrip be at least 1,000 feet from any adjoining property line. It also prohibited paved airstrips and eliminated the amortization period. Exhibit 119(b).

Based on the Council's adoption of ZTA No. 10-15, Mr. Shoemaker, Ms. Laurencot, and the Sugarloaf Citizen's Association requested the Hearing Examiner to limit legal argument solely to the issue of whether the recently adopted ZTA should be applied to this petition. Exhibit 119(a). Counsel for petitioner agreed to the request. Exhibit 120. On March 11, 2011, those opposing the petition submitted a Motion for Summary Disposition in which they argued that ZTA No. 10-15 *did* apply to the petition and the petition should be dismissed because the application was moot. Exhibit 122.

Petitioner then submitted his Response to Motion for Summary Disposition, alleging that ZTA No. 10-15 was a "special law" prohibited by the Maryland Constitution. Exhibit 123(a). Other than that allegation, the response contained no explicit legal argument why the text amendment should not apply to the petition. Instead, it contained two summary statements. The first asserted that the evidence introduced in the case "conclusively" established that Petitioner met all the special and general conditions for approval of a special exception under §59-C-2.00.4. Exhibit 122(a). Petitioner's second pronouncement was as follows:

2. Applicant acknowledges that in a disturbing and intentional act of interference with this proceeding, the County Council adopted ZTA 10-15 on March 8, 2011.

Exhibit 122(a). Petitioner then admitted that his petition does not comply with ZTA No. 10-15 because it did not aid farming operations and it did not meet the new 1,000 foot setback from a property line. Exhibit 122(a).

For the reasons which follow, the Hearing Examiner concludes that ZTA No. 10-15 applies to this petition and is not a “special law” prohibited by Article III, Section 33 of the Maryland Constitution. Therefore, the Hearing Examiner recommends that the Board of Appeals deny the application because the petition is moot, i.e., the proposed use is not permitted as a special exception in the RDT zone.

II. FINDINGS AND CONCLUSIONS

A. Application of ZTA No. 10-15 to this Petition

In support of their argument that that ZTA No. 10-15 should be applied to this petition, Opponents cite a number of cases involving “retroactive operation of statutes.” Exhibit 122. These are cases in which a zoning law was enacted *after* a zoning application has been decided but while litigation was still ongoing. *See, Margaret McHale v. DCW Dutchship Island, LLC, et. al.*, 415 Md. 145, 171 (2010); *Id.*; *Layton v. Howard County Board of Appeals*, 399 Md. 36, 58 (2006); *Yorkdale Corporation v. Powell*, 237 Md. 121, 126 (1965).

Because this petition has not yet been decided by the Board, the Hearing Examiner believes that analysis is somewhat premature; rather, the question is simply whether Petitioner has acquired a vested property right in the proposed use which protects it from subsequent changes to the Zoning Ordinance. *See, Maryland Reclamation Associates, Inc. v. Harford County, Maryland*, 414 Md. 1, 44-45 (2010). Maryland courts have consistently held that applicants in zoning cases do not acquire a vested right in a zoning approval until (1) the owner has obtained a valid permit, (2) has made a substantial beginning in construction in reliance on that permit, and (3) all litigation related to the approval has been terminated. *Maryland Reclamation Associates,*

414 Md. at 44-45; *City of Bowie v. Prince George's County*, 384 Md. 413, 425 (2004).

As the Petitioner does not yet have a valid, final permit to use his property for a private recreational airstrip, he has *not* acquired a vested right in the use under Maryland law.

Assuming the cases cited by the Opponents were applicable, the result would be the same. A law adopted after a zoning case has been decided but before litigation is concluded will be applied if: (1) the legislature intended that it apply and (2) the new law does not impact a “vested” property right. As set forth above, the applicant did not acquire a vested property right in the proposed use for an airstrip. To determine the Council’s intent, Hearing Examiner must apply the traditional rules of statutory construction. *Id.* If the language of the new law is clear and unambiguous, the Examiner need look no further to ascertain the Council’s intent. If the language is ambiguous, the Hearing Examiner may look at the statute’s legislative history and stated purpose to determine what the Council intended. *Id.* Where the legislation is silent as to the Council’s intent, the Hearing Examiner must *presume* that the Council intended the new law to apply to a pending application if it substantively impacts the merits of the application. *Id.*; *Layton v. Howard County Board of Appeals*, 399 Md. 36, 58 (2006); *Yorkdale Corporation v. Powell*, 237 Md. 121, 126 (1965).

Zoning Text Amendment No. 10-15 (Ordinance No. 17-03) contains no express direction that it be applied to this petition. The ZTA’s legislative history, however, reveals that the District Council did intend it so to apply. The stated purpose of ZTA 10-15 was to “clarify” that airstrips in agricultural zones must be associated with farming activities. The District Council’s Opinion preceding the text amendment (adopted by the Council with the ZTA), recites that the Planning, Housing and Economic Development

(PHED) Committee of the Council recommended approval of the ZTA with two amendments: (1) adding requirements prohibiting paved airstrips and mandating that airstrips be located at least 1,000 feet from a property line and (2) deleting the amortization period and making the legislation effective on the date of the approval. Significantly, the Opinion makes clear that the District Council was aware of the pending petition in this case and the impact of its recommendation to eliminate the 20-day effective date in the legislation as introduced:

The committee was informed that ZTA 10-15 would apply to the pending application and all future applications. Under those circumstances, the Committee recommended deleting the amortization period proposed by ZTA 10-15 and changing the effective date to make the ZTA effective when approved.

ZTA 10-15, p. 2. The Chairperson of the PHED Committee cast a dissenting vote, in part because she did not believe the new law should affect this petition. The District Council adopted the text amendment with the changes recommended by the PHED Committee. As a result, the legislative history reveals that retroactive application of ZTA No. 10-15 to this application was an issue before the District Council and that a majority of the Council adopted the ZTA with the understanding that it would apply to this as well as all future petitions. Exhibit 119(b).

Petitioner allegations (1) that the evidence “conclusively” established that the application should be granted and (2) that the Council intentionally and substantially appear irrelevant to the disposition of this case. However, the Hearing Examiner finds both statements both legally and factually incorrect.²

² It may be that the summary assertions in Petitioner’s Response are intended to assert a vested property right in something other than the right to use his property for a private recreational airstrip. The allegation that the Council intentionally interfered in this proceeding suggests that Petitioner views the ability to prosecute his application to its conclusion as his “vested right”. In *Dua v. Comcast Cable of Maryland*,

Legally, the implication that Petitioner was entitled or “conclusively” would have received approval of the special exception before a decision by the Board ignores the burden of proof in this case. The Petitioner bears both the burden of submitting evidence that he meets all conditions for approval *and* the burden of *persuading* the decision-maker that the application should be approved. *Montgomery County Zoning Ordinance*, Section 59-G-1.21(c). Therefore, Petitioner’s description of the evidence as “conclusive” is premature because there is no legal authority compelling the Board to grant the use, especially where there is credible evidence supporting denial. Section 59-G-1.21(a)(2) of the Zoning ordinance provides, “[T]he fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.” Accepting Petitioner’s statements on their face would permit an applicant to bootstrap a mere assertion into a vested right protected by the Maryland Constitution and avoids the role of the Board of Appeals. Should Petitioner decide to argue the weight of the evidence in this case before the Board, the Board would be weighing the evidence without actually observing the testimony.

Petitioner’s argument also ignores the broad authority of the Board of Appeals to impose conditions on the grant of a special exception. *Halle v. Crofton Civic Association*, 339 Md. 131, 146 (1995). The Board of Appeals is not bound to accept the

Inc. 370 Md. 604 (2002), the court in one of the cases held that the plaintiff had a common law property right to sue for interest on late fees in excess of the legal limit. When the legislature passed a law eliminating the legal “cause of action” to recoup the interest, the court found there was a property right not only in the money illegally charged, but also in the remedy to recover the money. *Dua* would not be controlling for this petition because in *Dua*, a property right (i.e., the money illegally charged) had already vested. *Dua* simply protected the ability of the plaintiff to recoup that property right. In this case, Petitioner never had a vested property right in the special exception approval to begin with, therefore, he doesn’t have a vested interest in completing these zoning proceedings.

special exception use *as proposed* by the Petitioner; rather, it holds broad authority to impose conditions to ensure that the use protects the general welfare.³ While the Petitioner may feel that his evidence was sufficient to entitle him to the use as proposed, there is nothing “conclusive” about the parameters of the use that would ultimately be approved by the Board.

Nor does the Hearing Examiner find as a matter of fact that the evidence was “conclusive” as Petitioner suggests. Under Maryland law, the Board’s decision may be upheld if there is substantial evidence in the record to support its decision. “Substantial evidence” is evidence from which “reasonable minds could come to different conclusions.” *Montgomery County v. Melody Butler*, 417 Md. 271, 283 (2010); *Maryland Reclamation Associates*, 415 Md. at 29 (when there are two differing opinions of two well-qualified experts and the issue is fairly debatable, the Board may quite properly accept the opinion of one and not the other”). As the *Butler* court stated, “[T]he test is reasonableness and not rightness.” *Id.* at 307. A summary of the testimony presented at the public hearing is contained in Appendix A. The Hearing Examiner did not weigh the balance of the evidence presented because of the intervening legislation; however, she did find that there was credible evidence in the case which could have supported denial of the petition. By way of illustration and not limitation, the Hearing Examiner notes that the Vision Division determined that the use was not consistent with the AROS master plan. Exhibit 28, Attachment B-2. Testimony from several witnesses would have supported a finding that the proximity of the airstrip to the entrance of Bucklodge Park and the southern property line was a non-inherent adverse impact. Mr.

³ Even assuming, without deciding, that the Board was preempted from limiting flight frequency and times, this did not impact the ability of the Board to impose conditions related to other matters, such as the location of the airstrip.

Wayne Six, a qualified real estate appraiser, testified that the airstrip would lower the property values of those adjoining Petitioner's southern property line by 8% to 10%. In his opinion, the primary reason for the devaluation was the proximity of the airstrip to those homes (one of which is 300 feet from the airstrip and the other approximately 380 feet from the airstrip) with the attendant visual impact and noise. T. 116, (12/10/2010); T. 116 (2/18/2011). Ms. Carolyn Laurencot, whose property adjoins the southern property line, testified that the visual impact of the plane is "terrifying" because it appears to be heading directly toward her house before it veers toward the landing strip. T. 49-53. Ms. Anne Cinque testified that the horseback and hiking entrance to Bucklodge Park is immediately across Peach Tree Road from the airstrip and the shoulder of the road is narrow in that location. T. 242. She stated that she rides horses at that location and believes that the airstrip would cause her horse to bolt. T. 242. The Hearing Examiner finds that there was substantial evidence in the case which could have justified denial of the application.

In addition, the Hearing Examiner does not find any factual support in this record for Petitioner's "acknowledgement" that the Council's adoption of ZTA No. 10-15 was a "disturbing and intentional act of interference with this proceeding". Exhibit 122(a). Other than adopting legislation as permitted by law (discussed above), there is no indication that the Council directly or indirectly attempted to disturb the hearing process on the petition. There are only two exhibits in the case directly related to the ZTA—the ZTA as introduced and the ZTA as adopted.⁴ Exhibits 75(b) and 119(b). The legislative

⁴ Petitioner objected to the introduction of a letter from the Chairperson of the Planning Board. Exhibit 89; T. 56-58, 74-76 (02/18/11). The letter bears no relation to the ZTA nor does it advocate any position on the application; rather, it requests the Hearing Examiner to review closely whether the Board was preempted from imposing certain conditions when it recommended approval of the application. As Petitioner

history of ZTA No. 10-15 does indicate that the Council intended ZTA 10-15 to apply to the petition, but there is no evidence in the record to distinguish the Council's actions from other numerous cases which have upheld the ability of the Council to enact legislation applicable to a pending petition.

B. Special Law

Petitioner also contends that ZTA No. 10-15 is a “special law” prohibited by Article III, Section 33 of the Maryland Constitution. That section of the Constitution prohibits the General Assembly from enacting a “special Law, for any case, for which provision has been made, by an existing General Law.” *Md. Const. art. III, § 33*. The purpose of this Constitutional prohibition “is to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others.” *Mayor, etc., of Baltimore v. United R. & E. Co.*, 126 Md. 39, 52 (1915). A special law is as law enacted “for the relief of named parties or provides for individual cases.” *Reyes v. Prince George’s County*, 281 Md. 279, 305 (1977) and includes “one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class. *Cities Service Company v. Governor, State of Maryland*, 290 Md. 553, 567 (1981). Courts use several factors to determine whether a law is “special” law within the meaning of the Constitution:

1. Whether particular entities are identified in the statute;
2. Whether a particular individual sought and received special advantages or was discriminated against by the legislation;

addressed the same issue at length in his memorandum, the Hearing Examiner would have undertaken such an analysis in any event. The Hearing Examiner admitted the letter stating that she would give it “the weight it deserves”. T. 76 (02/18/11).

3. Whether there was a public need or interest underlying the enactment and the inadequacy of existing law to service the public need;
4. Whether the legislation draws arbitrary or unreasonable distinctions within a class of individuals or entities.
5. The practical effect of the law rather than merely the form.

Cities Services, 290 Md. at 568.

Simply because a law currently impacts only one person or entity does not necessarily make it a special law. *State of Maryland v. Burning Tree Club, Inc.*, 315 Md. 254, 274 (1989). These laws are permissible either when the person affected is a class unto itself or where, even though the law applies to one person now, it would apply other similar persons in the future. *Id.*

An example of a law applicable to only one entity which was *upheld* by the court is that in *Reyes v. Prince George's County*, 281 Md. 279 (1977). In *Reyes*, the General Assembly enacted a law enabling Prince George's County to issue revenue bonds for construction of a sports stadium within the County. At the time the law was adopted, only one sports stadium (at Largo) was under construction in the County. The court held that the law permitting revenue bonds was *not* a special law because even though the arena was the only entity affected, the law was applicable to all such facilities in Prince George's County which the County may wish to finance. *See, also, Potomac Sand & Gravel v. Governor*, 266 Md. 358 (1972) (act making it a criminal offense to dredge for sand and gravel in the tidal areas of Charles County was not "special law" even though there was only one business in the County engaged in dredging at the time.)

An example of a law held to be a prohibited "special law" was the law addressed by the Court in *Cities Services*. That law created two exemptions from a general law

precluding petroleum distributors or refiners from operating retail service stations. The two exemptions were for “mass merchandisers” and “agricultural cooperatives” who owned an existing service station on January 1, 1979, which was operated by a subsidiary of a petroleum producer as of January 1, 1979. The only company which could come under the “agricultural cooperative” exemption was Southern States Cooperative, Inc., and the only company which could come under the “mass merchandiser” exemption was Montgomery Ward. Because of the date restrictions, no other company in the future could receive the exemption. The *Cities* court held that the legislature’s had been arbitrary in distinguishing those two particular companies from future similar entities; there was no evidence in the case which justified the basis for this distinction.

Applying these principals to this petition, and based on the evidence before her, the Hearing Examiner finds that ZTA 10-15 is *not* a special law prohibited by the State Constitution. No individual persons are named in the statute. While individuals or organizations may have advocated for the law, this is not alone dispositive because the evidence in this case supports the fact that the legislation served legitimate public interests. The Council legislatively resolved an ambiguity in the prior ordinance and determined that private recreational airstrips were not compatible with other uses in the RDT Zone. It also enacted the legislation before such uses could be established, all of which actions are within the prerogative of the County Council.

Nor does the Hearing Examiner find that the Council improperly discriminated against one individual member of a larger class. In this regard, the Hearing Examiner finds the facts of this case closer to those in *Reyes* than *Cities*. While this may be the only current petition requesting a private recreational airstrip, the ZTA applies to all

entities in the future which desire to operate a recreational airstrip. The Opinion preceding ZTA No. 10-15 states that the PHED Committee was informed that, “ZTA 10-15 would apply to the pending application *and all future applications.*” (Emphasis supplied). Therefore, as in *Reyes*, the Council did not single out this particular individual; rather, it precluded all future applicants from applying for a use which it deemed incompatible with other uses in the zone.

IV. RECOMMENDATION

Because the Hearing Examiner finds that the Petitioner acquired no vested rights in the use of the property for a private recreational airstrip and that the Council intended ZTA No. 10-15 to apply to all pending and future applications, she recommends that this case be DISMISSED because the application is now moot.

Dated: April 15, 2011

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner

APPENDIX A

SUMMARY OF TESTIMONY

December 10, 2010 Public Hearing:

1. Mr. Anthony Walker:

Mr. Walker testified that his property is adjacent to the northern boundary of Dr. Gillespie's property. T. 29. He has seen Dr. Gillespie land on several occasions and found the sound to be "barely audible". T. 30. When the plane taxis up to the road, the noise level is barely more than a tractor mowing the grass. T. 30. The plane takes off easily and it's gone before it gets to his house. It clears a high row of trees at the back of the property. T. 30-31. Mr. Walker did not find the sound level for 300-400 feet obnoxious. T. 31. Dr. Gillespie flies a small plane that takes off effortlessly. He returns from the same path over the trees on Peach Tree Road and cuts the throttle as he comes in to land. If you were having a conversation, you "wouldn't even turn around." T. 31.

On cross-examination, Mr. Walker testified that his house is less than 1,000 feet from the airstrip. It is about the same level east-west as Dr. Gillespie's house, just slightly northeast and right against the common property line. T. 32.

2. Robert Q. Gillespie:

Dr. Gillespie testified that he is an orthodontist and has owned the subject property for 10 years. It is his principle residence. T. 34. He uses to the property to grow hay. It has approximately 1,000 feet of frontage on Peach Tree Road. The house is approximately 2,000 feet from the road. The driveway access is on the southern portion of his property. T. 34. The house is located on the back third of the property.

Dr. Gillespie testified that there is a hedgerow of Leyland Cypress trees between his driveway and the southern property line he shares with Ms. Poch. The trees shield the airstrip from the site. T. 35-36. The property is zoned RDT and is assessed as farmland because he harvests the hay grown on the property. T. 38.

A licensed pilot since 1995, Dr. Gillespie testified that his training requires logging a specific number of hours with a flight instructor until a level of competence is achieved sufficient to take a flight exam with an FAA certified examiner. If one passes the exam, they may become a licensed pilot. Recurring training is required every two years. T. 38.

Dr. Gillespie stated that he proposes to use a “Citabria” airplane. T. 38. A Citabria is a “tailwheel” plane because there is a wheel in the back and the wings are high. It has a single engine and a single propeller and weights approximately 1,200 lbs. His plane is currently registered with the State and hangared at an airport in Westminster, Maryland. T. 38-39. He proposes to park the plane outside in his back yard. T. 39.

The airstrip is grass and about 1,000 feet long. It’s located on the southeastern portion of his property and maintained by cutting the grass with a lawn mower. T. 39-40. There will be no pavement, grading, lighting, signage, employees, equipment or traffic generated. T. 40-41.

Dr. Gillespie testified that he first landed the plane on his property in 2006 and has flown in and out approximately 20-25 times, most recently to conduct the noise tests. T. 41-42. He has never experienced safety problems. The airstrip is longer than required for his plane. The topography, slope, nature of landing surface and length of runway satisfy requirements to land his plane on the airstrip. T. 42.

There are electrical wires which cross his property from the southeast to the northwest. They have no effect on the safe operation of the airplane because the wires are below the “glide slope” of the plane. T. 43. In order to land over the trees on the east side of Peach Tree Road, Dr. Gillespie stated that he has to glide higher than the height of those wires, so they have no impact on safe use of the airstrip. He has no concerns over the safety of the airstrip. T. 43. The FAA has approved the airstrip and the MAA has inspected and approved the airstrip. T. 44. The FAA form 7480 that has been submitted into the record is the form referenced in the special conditions for the special exception. Exhibit 10. T. 44.

Dr. Gillespie stated that he is not aware of any non-inherent impacts from the proposed operation of the airstrip different on his property than if operated elsewhere in the zone. T. 47. He stated that the distance of the airstrip from adjoining properties, and the topography and safety of the runway mitigate any adverse impact and permit the airstrip to be operated safely. T. 47. He stated that the row of cypress trees to the southeast shields the airstrip from adjoining property. He does not propose to ever fly over or towards any of the 4 adjoining property owners. T. 48. He flies out to the west over a big, uninhabited farm and to the east is Bucklodge Park, which is also uninhabited. T. 48-49. He stated that the adjacent properties are so close that when he’s lined up to land his plan, his flight plan leaves him well outside those properties. T. 48. He is the only person that will use the airstrip and his Citabria is the only airplane he will use. He will only fly the airplane two times a week during daylight in favorable weather conditions. T. 49-50. He agrees to abide by the conditions of approval in the Technical Staff Report. T. 50.

On cross-examination, Dr. Gillespie testified that the power lines cross the far eastern border of the airstrip. T. 51. The Cypress trees along the Poch property do not go all the way to the rear property line; they begin about one-fifth of the distance from Peach Tree to the airstrip. T. 52. Dr. Gillespie stated that the airstrip will not be used for agricultural purposes; it will be a strictly recreational use. T. 53. He must provide advance notification and must file a flight plan with the FAA when he flies. T. 53. It is his understanding that he must do so every time he flies because his property is one mile inside a restricted area imposed after 9/11. The notification is done over the phone. T. 53. He is not trained in what qualifies as a safe airstrip. T. 54.

He stated that the Planning Board condition requiring him to fly only in “fair weather” meant that he would not fly with less than one mile of visibility and in conditions in which the aircraft would be in clouds. T. 54-55. If poor visibility occurs during flight, there are three close airports at which he could land. These are Gaithersburg, Leesburg and Frederick, which are all about 10 miles away. T. 55.

Dr. Gillespie stated that his plane can take off in less than 500 feet depending on the strength of the headwinds, the slope of the runway and how closely the grass is cut. T. 58. The airstrip slopes down 15 – 20 feet from Peach Tree Road. He is able to depart and land in either direction depending on the prevailing winds. He prefers to land toward Peach Tree Road. The uphill slope of the airstrip in that direction slows the plane. He prefers to take off to the west because the downhill slope in that direction helps the plane to gather speed. T. 59-60. The FAA provides the data on prevailing winds at the pre-flight briefing. If the conditions change during flight, he is able to tune to a radio frequency which provides the weather conditions at the moment. T. 61.

Dr. Gillespie's pilot's license certifies him only to fly under "visual flight rules" and does not permit him to use instruments to pilot the plane. T. 62. Instrument-rated pilots may fly in poor weather and into clouds. T. 62. VFR allows a pilot to fly when you can see well enough to operate the plane safely without instruments. T. 62.

2. William Morrison Krozack:

Mr. Krozack was qualified as an expert in airport licensing in Maryland and compliance of airports with the Code of Maryland Regulations. T. 75-76. He works for the Office of Regional Aviation Assistance of the Maryland Aviation Administration. T. 75. Mr. Krozack stated that he inspects all public use airports annually. Private use airports are inspected bi-annually. Currently, there are 102 registered private airstrips and about one-half of those are on farms. Out of those, 7 are paved and two are on water; the remaining are grass airstrips. T. 76-77. Most of the airstrips are primarily for recreational use. It is not unusual within the State for an airstrip to be located on a property the size of Dr. Gillespie's. T. 77

Maryland promulgates registration requirements for airstrips. His predecessor inspected Dr. Gillespie's two years ago and he inspected the airstrip in March, 2010. T. 77. Maryland regulations are different for private, commercial airports and private non-commercial airports. T. 78. For the airstrip on the subject property, his investigation involves confirming the length, width, any obstructions close to the runway, grading of the runway and area outside the runway and looking at obstructions at both ends of the runway. T. 78. He found that the airstrip on the subject property was suitable for private non-commercial daylight use and that the aircraft was suitable for the length and width of the runway. T. 78-79. The MAA requires three things in order to register a private non-

commercial airstrip: 1) an airspace determination from the FAA, 2) an application for registration with the MAA, and 3) local zoning approval. T. 79.

Mr. Krozack stated that there is nothing unusual about the operation of the proposed airstrip, or the physical or topographical conditions at this location. T. 80. The proposed use is not an “ag strip”, which is an airstrip specifically used for application of chemical or fertilizer to farm fields. T. 80. “Ag strips” are exempt from the COMAR registration requirements. T. 80-81. Mr. Krozack stated that the COMAR regulations applicable to the proposed use are contained in COMAR, Chapter 4.

On cross-examination, Mr. Krozack stated that the terms “airport” and “airstrip” were synonymous. In COMAR, airports are defined as a “combination of one or more designated landing areas and any surrounding support facilities.” T. 82. Neither the FAA nor the MAA regulate fuel storage and some airstrips do have fuel storage. T. 83. Fuel storage is not proposed at this location. The MAA does not regulate frequency of flights. T. 83.

Wind and visibility may vary by regions but are generally very close. T. 84. A pilot can get an idea of conditions from Davis and Gaithersburg airports. T. 84. The MAA inspects airstrips biannually to review whether conditions since the last registration have changed. The MAA does not regulate buildings, so construction of a barn would not constitute a changed condition for their purposes. T. 85.

According to Mr. Krozack, the FAA Charting Office determines whether a private airstrip is mapped. Some pilots do not wish to be charted because this means that their airport will be listed on aeronautical charts to aid airplanes in distress. T. 86-87. The MAA regulates only the airports; only the FAA regulates the pilot’s activities. T. 88.

There are no Maryland regulations on noise from aircraft; physical inspections of the airplane are regulated by the FAA. T. 88.

The MAA would not inspect the airstrip to determine if the pilot had changed the type of airplane used on the airstrip because they do not regulate the aircraft. The aircraft could change tomorrow and the MAA would not reinspect because they do not register or regulate the aircraft. T. 89. Nor would the MAA monitor a condition limiting the frequency of flights. T. 89. The MAA approved the airport for “daylight” use. Daylight is civil twilight which may be found in almanacs. T. 89-90. He was not familiar with other private airports in Montgomery County that had recently closed and did not know their size. T. 90. He did not feel that the power lines crossing the property were the “controlling obstruction” to the runway; rather, the controlling obstruction was the 53-foot trees on the east side of Peach Tree Road which were 62 feet from the end of the runway. The term “controlling obstruction” means the obstruction most difficult to clear. T. 91. He did not believe the trees were a concern at this time based on the published performance specifications of Dr. Gillespie’s plane. T. 91-92. The published performance specifications are based on a “standard day” which has zero winds and is 15 degrees Celsius and the maximum weight the plane is designed to carry. T. 93. The Pilot’s Operating Handbook has performance charts that will allow interpolation of these performance specifications and specific weather conditions. The MAA did offer Dr. Gillespie the use of an orange ball to make the power lines more visible. T. 92-93. They could not require him to install the ball because the power lines were not the controlling obstruction. T. 98.

Mr. Krozack stated that the term “clear weather” stated in the Planning Board’s condition was not defined and there would be no way for the MAA to gauge whether the applicant was in compliance with this condition. T. 93-94. The FAA requires the applicant to comply with VFR weather. T. 94. These flight rules do not take into account wind conditions—only visibility and cloud height. T. 94, 102. The safety for adjacent properties is governed by local zoning. T. 94.

The MAA’s inspection involves determining the length and width of the runway. The wider the airstrip the better, but there is no standard for width. T. 95-96. They also look at any obstructions in the approach surfaces. Here, there are the 53-foot trees on center line to the runway. They also make suggestions to the owner on any deficiencies on the surface of the airstrip such as holes or ruts, but the MAA does not regulate that. T. 96. Generally, these aren’t a problem because the owner has an interest in maintaining the runway. T. 96.

When asked by the Hearing Examiner whether there was any circumstance the MAA could deny an airstrip due to construction, Mr. Krozack testified that he could put into place on-field changes to the airfield that would allow for the obstructions. He had not had an obstruction to date that could not be accommodated by on-field changes. T. 97. The applicant has a 20-foot clearance over the power lines. Mr. Krozack stated that if the trees grow higher, the applicant does not have to cross over the trees. T. 99. Later, Mr. Krozack testified that if the trees grew taller, they would have to reassess whether they wanted to limit landings on “just one particular runway”. T. 104.

He stated that the applicant did not have to fly over adjoining properties because he heads northwest over farmland or southeast over forest. T. 101. The FAA requires

approval of private airports to determine departure airspace for major airports and for emergencies situations in which air traffic control must direct an aircraft into an airport. Even if the applicant chooses not to have his airstrip charted, emergency landings could still take place there by radar. T. 102-103.

The FAA recommended that a clear 20 to one approach slope be established and that the center line of a runway have lateral separation of at least 60 feet from roads and other objects with approach speeds less than 50 knots, which is applicable to this aircraft. T. 106. The clear twenty to one approach slope is not met in this case and there is nothing COMAR requiring it to be met. T. 106. He stated that for the MAA, a lateral separation from the centerline of the runway was “not an item”. T. 107.

4. Donald W. Rohrbaugh, II:

Mr. Rohrbaugh qualified as an expert in land planning. T. 109-112. He testified that an exemption for the forest conservation regulations has been approved by Technical Staff for the subject property. T. 114.

The property is roughly rectangular. There is an existing house adjacent to the southeastern portion of the property line near Peach Tree Road. T. 114. Another existing house is located on adjoining property to the south. The house on that property is located approximately mid-way between Peach Tree Road and the applicant’s rear property line T. 114-115.

The house located near the southeastern property line is approximately 300 feet from the edge of the airstrip. The common property line for that property (located nearest to Peach Tree Road) is 230 feet from the airstrip. T. 116.

The second house (further west from Peach Tree Road) lies 380 feet from the corner of the airstrip. The common property line for the second property is 200 feet from the corner of the airstrip.

To the north, there are also two properties adjoining the subject property. The property closest to Peach Tree Road is located approximately one-half of the distance of the property line from the road. T. 116. The house and the property line are 800 feet and 670 feet, respectively from the corner of the airstrip. T. 116-117. A second residence bordering the applicant's northern property line (toward the northwest) is 900 feet from the edge of the airstrip. The distance from the airstrip to the property line is approximately 700 feet. T. 116.

The balance of the buildings located along the adjacent properties is barns, sheds, and outbuildings. To the east of the property (across Peach Tree Road) is Bucklodge Conservation Park which is a large area of wooded land with trails. To the west is a farm consisting of approximately 150 acres which extends to Old One Hundred Road. T. 117.

The site itself is largely open field with a few hedgerows and scattered, individual trees. A row of Leyland Cypress starts, 25 to 30 feet tall, begins about 80 feet from Peach Tree Road which continue about 80 feet past the house. There is a small gap, and then a hedgerow of mixed trees continues to run along the southern property line after the Leyland Cypress end. Hedgerows which vary in height, density and opacity continue along the southern property line. T. 118-119.

On the northern side of the property, there's another area of Leyland Cypress that starts approximately 60 feet from the northwest corner of the property and runs east for about 150 feet. T. 119. Then the land is fairly open from that point back to the house

which is located approximately mid-way from east to west on the property. T. 119. After that opening, there is a double row of white pines that runs from 400-500 feet along the northern property line then turns into a double hedgerow. This screens the house bordering this hedgerow. T. 119.

The subject property is fairly open with some deciduous trees and scattered spruce and white pine. The house is located on the mid-part of the property. There's a garage adjacent to the existing house and some parking around the house. To the rear of the house are some garden areas, a swimming pool and several outbuildings. T. 120-121. The remainder of the property is cultivated as a hayfield.

Topographically, there is a high area along Peach Tree Road about mid-way along the road frontage. From that area, the ground slopes down by approximately 50 feet to a swale. T. 121-122. The swale is almost in the dead center of the northern property line. T. 122. The water drains down that side to a swale and then there's a rise from there up to the house. The landing strip starts out fairly high at the road and slopes down by about 10 feet at the center. The strip then tilts up approximately 5 feet at its western end. T. 122.

Mr. Rohrbaugh testified that there are two neighborhoods surrounding the subject property, the immediate neighborhood and a larger neighborhood. In his opinion, the immediate neighborhood consisted of the "most proximate houses". T. 124. These include the four houses immediately adjoining the property, an additional two houses to the south and an additional house to the north. T. 124.

According to Mr. Rohrbaugh, the larger neighborhood is defined by several roads—the major roads surrounding the site are Comus Road that runs north of the

property, Peach Tree Road which borders the site on the east side, West Old Baltimore Road to the south and beyond the two 150-acre farms to the west lies Old Hundred Road. T. 125-127. The property is zoned RDT or Rural Density Transfer” and is within the 1980 Functional Master Plan for the Preservation of Agriculture and Open Space. This master plan is a “catch-all” master plan for areas that are to be lower density, and preserved for farmland and open space. T. 126-127. The master plan makes no specific recommendation for this property or any other property. It’s a generalized statement of intent and a statement of the goals of maintaining and prohibiting certain land uses within the rural area of the County. T. 127-128. Its goals are to preserve farmland and prohibit and resist high-intensity development such as small lot subdivision, and certain types of commercial and industrial uses. T. 128.

Petitioner does not proposed any improvements to the existing condition of the property. Ongoing maintenance of the landing strip consists of mowing the grass strip. T. 129.

Mr. Rohrbaugh testified that the petition complies with all standards of the RDT Zone. The maximum density in the RDT is one unit or one lot per 25 acres. It exceeds some of the bulk regulations such as that requiring minimum road frontage of 125 feet (the subject site has approximately 1,000 feet), and it meets the setbacks. There is nothing about the proposed use which would violate the requirements of the zone. T. 130. Technical Staff of the M-NCPPC approved an exemption from the Forest Conservation requirements because no forest (or significant trees) are being removed. T. 131. The use is also permitted as a special exception within the RDT Zone. T. 133. The master plan includes an airstrip associated with a farm as a special exception use within

the zone. There are two special conditions for the use: (1) that only a single airplane be permitted to be permanently housed at the airstrip and a favorable airspace determination from the FAA. T. 135. Both conditions have been met—the favorable determination from the FAA is the Form 7480 to which Mr. Krozack had testified. T. 135.

Mr. Rohrbaugh testified that the airstrip is consistent with the master plan because it's a very "low key" and sporadic use. There is little visual impact because the strip is grass and there is no lighting; it's difficult to distinguish from the rest of the property. T. 136. It has a *de minimis* impact on the master plan's goal to preserve agricultural uses because it's a very small amount of land (50' x 1,000') out of 40 acres. It permits the bulk of the property to continue as agricultural use and if discontinued, nothing would prevent it from being used again as a hayfield. Its impact on the agricultural use of the farm is smaller and its impact on the agricultural use in the larger area is smaller. T. 137. Mr. Rohrbaugh also stated that he believed the use was consistent with the master plan because it's mentioned in the appendix thereto. T. 137. He also testified that the use was consistent with the Functional Master Plan for Rustic Road. That master plan designates two separate kinds of roads, those that are "rustic roads" and those that are "exceptional rustic roads." Peach Tree Road is not one of the exceptional rustic roads (although it is a rustic road). The rustic road designation is not intended to affect the use of land adjoining rustic roads except in the design of access to a subdivision. Therefore, the fact that Peach Tree Road is designated as a rustic road has no impact on the special exception use. T. 138. He also stated that the proposed use would not require any changes to Peach Tree Road and would not add traffic to the roadways. T. 138.

Mr. Rohrbaugh testified that he believed that the proposed use was in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any new structures, intensity and character of activity, traffic, parking conditions and the number of similar uses. T. 139. There is nothing that would denigrate the physical appearance of the neighborhood because the grass strip had little visible impact. Also, the conditions proffered by Mr. Gillespie to limit the frequency of flights greatly impacts the ability of the use to be in harmony with the general character of the neighborhood because the use would be sporadic and seasonal. While he is not a noise expert, there are other uses such as motorcycles or “farm-type” uses that produce the same amount of noise. Also, the noise is of very short duration—a few seconds of noise for takeoffs and landings. T. 140-141.

He did not think that the proposed use would be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties in the general neighborhood because it will be sporadic and infrequent. It is not unusual for equipment or noises emanating from a farm that are as disruptive as the proposed aircraft. Chainsaws and woodcutters go on for longer periods of time. T. 142-143.

Mr. Rohrbaugh stated that he did not believe there would objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the site because there were two impacts from the proposed use. One impact was the noise impact which would be very infrequent and not substantial enough to be detrimental. The other impact was the visual impact of a plane taking off and landing. T. 143-144. He felt that impact would not be any different from looking up at the sky and seeing an aircraft, which one

can do at any time. T. 144. These two impacts are inherent with an airstrip associated with a farm.

Mr. Rohrbaugh stated that the Zoning Ordinance does not address noise as a special exception standard. Petitioner's proffer to limit the frequency of take-off and landings to two per week would mitigate the inherent adverse impact of this use. His property is also of adequate size to place the landing strip, although the location is restricted somewhat by topography. T. 146. Other areas of his property have a 15-25% slope. T. 146.

As to the next general condition, Mr. Rohrbaugh testified that the use would not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter predominantly the residential character of the area. He didn't think it would affect the neighborhood or have a "domino effect" because there have been so few of these special exception applications over the past 20 or 30 years. T. 147.

Mr. Rohrbaugh stated the use won't adversely affect the health, safety, security, morals or general welfare of residents or workers in the area and is adequately served by public facilities. According to Mr. Rohrbaugh, the three main public facilities are Peach Tree Road, water and sewer service and other utilities. This use will not impact any of these. T. 148. There is nothing which would make the inherent impact of this use greater than this location than elsewhere in the zone. T. 148.

On cross-examination, Mr. Rohrbaugh believed that the trees along the southern property line were 60 feet from the center line of the airstrip, but was not sure. T. 152. He testified that if this airstrip were located on another property of the same size but different topography, the airstrip might be able to be located elsewhere. The location is

constrained by the topography, but not the size. T. 154. He is not familiar with the exact agricultural operations on any of the properties in the immediate neighborhood. Nor had he done a quantitative analysis of the impact of the proposed use on property values. There would be no dust or fumes because fumes are localized around the airstrip, although he had not done a quantitative analysis to make this determination and the strip was grass rather than dirt.

He explained the site constraints stemming from topography. The area where the landing strip is located is the flattest area of the site. Every other area has topography that has steeper slopes. There is a swale in the center of the site which goes north and south, there's another swale in the southwest corner of the site that flows from the house and drops down 35 feet to the northwest corner. There is an area approximately in the northwest portion of the site, but that would have a side slope that could be slightly too severe. T. 158-159. There is nothing unusual in the topography of this site as opposed to other sites in the RDT Zone. T. 163.

He stated that his analysis of the impact of the neighborhood was based on the immediately surrounding properties rather than the neighborhood set forth in the Staff Report.

5. Mr. Gerald Henning:

Mr. Henning, an acoustical engineer, qualified as an expert in acoustical engineering. He set up three instruments at tripods at location one, two and three. Dr. Gillespie flew his aircraft in and out. He took off to the northwest, which is the flight pattern he typically uses, and landed to the southeast. Mr. Henning also did a simulated landing and take-off from the other direction because the prevailing wind was not

favorable in that direction. The “simulated” landing and take off involved coming in for a landing and throttling the plane up just before he touched down. While it wasn’t a true landing, it gave Mr. Henning some idea of the noise levels from the different directions.

The primary descriptor in measuring sound is the “A-weighted sound level.” Because humans don’t hear all sound frequencies equally, the instruments have an “A-filter” that simulates the way people actually hear different frequencies. The decibel is a logarithmic system and if you increase the level by 10 dBA, subjectively it sounds about twice as loud. T. 169. Conversely, a decrease of 10 dBA sounds half as loud. A five dBA difference is noticeable, a three dBA difference is generally perceptible. T. 170.

A different way to quantify noise is the “day-night average” sound level. This is the most common means of quantifying transportation noises like airplanes. T. 170. It uses the basic a-weighted decibel level but averages the noise level over a 24-hour period. Noise levels during nighttime hours are increased by 10 dBA to adjust for people’s increased sensitivity to noise during that time. T. 170. The Montgomery County guidelines for transportation noise use this method to measure noise from adjoining roadways.

A typical conversation for two people standing three feet apart is about 60 dBA. A person shouting three feet from another person is approximately 90 decibels. A truck about 50 feet away would be 80 to 85 decibels. T. 171. The day-night average method of measuring noise levels also takes into account the duration of noises. The longer the duration of a noise of a particular source, the higher the average level will be compared to a shorter duration of source generated noise.

Ambient noise is the naturally occurring background noise that's not a part of the noise from the source being measured. On Petitioner's property, typical noises would be distant aircraft, distant roadway, crickets, birds and traffic along Peach Tree Road. T. 171.

One other concept it is important to understand is the "equivalent continuous noise level" or an "average level". The duration of noise levels measured need not coincide with the duration of the source noise level. T. 173. He determined average noise levels by taking the sound energy from the aircraft's landing and take-off and calculated what the equivalent continuous level would be if you took all that energy and spread it out over the daytime period. This is a means of comparing one continuous noise to another continuous noise. T. 173-174.

According to Mr. Henning, the Montgomery County Noise Ordinance is a very simplistic means of measuring noise, as are most noise ordinances. It sets a maximum level of 65 dBA at receiving residential property during the daytime hours. It has no qualifications on the duration of the noise and is inappropriate for measuring noises of short duration. T. 174. The day-night average noise level takes into account the duration of the noise because it measures the sound energy of the noise and averages that into a specific time period. T. 174.

Mr. Henning testified that of the locations tested on Dr. Gillespie's property, location 2 was not near an adjacent residential property; rather it was on the subject property between the airstrip and Peach Tree Road. It's important to make that distinction because Environmental Planning based its recommendation to deny the application from sound levels at that location. The County's Noise Ordinance doesn't

apply to that location because it's not at a receiving residential property. Typically, one would measure the sound levels at the property line. During his testing, he measured levels on Dr. Gillespie's side of the trees. Location 2 was on Dr. Gillespie's property and across from Bucklodge Conservation Park, which is not a residential property. T. 176-177.

Mr. Henning testified that the noise levels generated by two take-offs and landings per week were substantially below the 55 day-night average sound level which is the goal for transportation noise in the Boyds area. Montgomery County uses criteria that are 10 dB less than HUD criteria. Therefore, compared to HUD criteria, Montgomery County transportation standards are only a quarter as loud. The test measurements look at a worst case scenario, i.e., on a day where there are two flights in and out of the airstrip. The equivalent continuous levels measured for the daytime are below the background ambient daytime levels that are out there without any kind of aircraft noise. T. 178-179. If one were to average the two flights over a week rather than a day, the levels would be much lower. As continuous levels, the levels are lower than those prohibited by the County's Noise Ordinance. The tests indicated that the highest continuous levels at a residential location were 44. T. 180.

Mr. Henning testified as to various noise levels from farm equipment. Tractors may generate 100 decibels at the property line. Compared with the 79 decibels generated by the aircraft, the farm tractor is almost 25% louder. Other types of equipment such as lawnmowers, weed whackers located at the property line could generate 95 decibels for more extended periods of time than the aircraft. The aircraft generates above 65 decibels and up to 79 decibels between 5 to 12 seconds of time during take-off and landing. T.

180. Seventy-nine decibels is about equivalent to a bus accelerating 25 feet away. T.

181. Mr. Henning stated that, in his opinion, the noise levels generated by the aircraft would be “insignificant”. T. 181.

Mr. Henning stated that he wanted to address five areas contained in the Environmental Planning Division’s report. As far as the tables included in their report, Mr. Henning felt that Staff should have clarified that the levels shown were maximum levels. Levels that were measured throughout takeoff and landing were lower. The table was also inaccurate where it stated that noise levels were “not given”. T. 185. Those measurements were not given because the levels were so low the decibels above background noise were not discernable. The conclusion reached by Environmental Planning Staff that all three categories of usage in his report exceeded the Noise Ordinance was based on measurements taken at Location 2 which is not adjacent to a receiving residential property. T. 185. He took measurements across Peach Tree Road from Location 2 on a takeoff with just a handheld meter. He measured a level of 70 compared to the highest level at location 2 where he measured 84. T. 185.

The conclusion made by Environmental Planning Staff that the sound level exceeded 75 dBA or greater in 23 instances is irrelevant. That is just a matter of the number of measurement locations and how many flights were measured. There were only 12 seconds during take-off that the aircraft noise exceeded 65 dBA. With two take-offs and landings per week, that is 24 seconds out of maximum of 604,000 seconds that the aircraft noise levels would be above 65 dBA. T. 187.

He also reiterated his opinion that the County's Noise Ordinance was not the appropriate means of measuring noise impact from the aircraft. Impact is a function of both sound levels and duration which the Noise Ordinance doesn't address. T. 181-189.

On cross-examination, Mr. Hennings testified that the ambient background noise is fairly quiet because there are no major highways or things like that but the aircraft noise is lower as well. The winds on the day he took the case were light and didn't significantly affect the noise levels. Humidity and cold may affect sound levels a little bit, but it takes thousands of feet to make a significant difference. T. 192. The trees along the southern property line were not significant enough to make a difference in the sound levels. Distance would impact the sound levels and the highest readings were at Location 1 which was much closer to the airstrip compared to the northwest portion of the property. T. 193.

With regard to his report, Mr. Hennings stated that the numbers 71, 71, 70, and 72 represented the average levels of the event above the background noise level. During takeoff, the aircraft accelerates and the levels climb to a maximum, the aircraft leaves the ground and then as it's flying away, the levels die down. Those numbers represented the average levels that were measured. The number of seconds represent the time during which the aircraft noise exceeded the background noise level. All of the numbers exceed the 65 dBA limit in the Noise Ordinance. All of the numbers relating to the simulated takeoff exceed the County Noise Ordinance standards, if it applies. T. 193-196.

Mr. Henning testified that at Location 3, which adjoined a residential property, 100% of the maximum dBA in each of the events were above 65 dBAs. At Location 4, which also adjoined a residential property, both takeoff events exceeded 65 dBAs. At

Location 5, adjoining a residential property, both events were above 65 dBAs and one of the two simulated events was above 65 dBAs. All 3 of the events at location 6 exceeded the maximum 65 dBAs. T. 196-197. As to the applicability of the County's Noise Ordinance, it was his understanding that for a special exception one had to look at the level of disturbance created by the noise generated by the aircraft and the Noise Ordinance doesn't accurately reflect the level of disturbance. T. 198.

His conclusion that the noise levels generated by the aircraft were not objectionable was based on the limited number of flights and duration of noise evaluated to come up with an equivalent continuous level of noise. T. 199. If the equivalent continuous level of noise, which the Noise Ordinance doesn't measure, exceeded 65 dBA, then he would conclude there was a violation of the Noise Ordinance. T. 190-202.

6. Mr. Glenn Reynolds:

Mr. Reynolds testified that he lives one mile to the east/southeast of the subject property roughly in line with the runway. He has known Dr. Gillespie for six or seven years and found him to be a very responsible individual who's is caring and courteous to other people. Dr. Gillespie is very much a fair weather flier and he feels confident that Dr. Gillespie will handle his aircraft in a responsible manner. One can go to Montgomery County Airpark and there are businesses at the east end of the runway that have parking lots very close to the runway. He stated that one can get a sense of how delicately a small aircraft approaches, lands and takes off in a way that goes beyond the perceptions and numbers relating to decibels. He feels that the airstrip is an acceptable use for the property. T. 203-205.

February 18, 2011, Public Hearing

1. Mr. Gerald Henning:

Mr. Henning was recalled as a witness. He stated that he had determined that the Montgomery County Noise Ordinance did not apply to noise generated by aircraft. While there was nothing explicitly exempting aircraft in the County's Noise Ordinance, Maryland courts had held that local regulation was preempted by federal law. He stated that the FAA has promulgated criteria for determining land use compatibility for airstrips adjoining residential properties. T. 8-9.

According to Mr. Henning, the federal criteria find acceptable noise levels below 65 dBA Ldn. Based on his measurements, the noise levels at takeoff and landing would be at 42 dBA Ldn, which is more than 20 dBA Ldn less than the level considered unconditionally acceptable by the FAA. T. 7-19.

2. Mr. James Pugh, III:

Mr. Pugh qualified as an expert real estate appraiser. He stated that the subject property consists of 39.72 acres. The residence sits back from Peach Tree Road in the center of the property and is primarily pastured and has rolling topography. A portion in the front near Peach Tree Road is more level, the rear and northern sides of the property are rolling and drop down. The house is situated on berm or knoll. According to Mr. Pugh, the topography is relatively typical in the area of Comus near Sugarloaf Mountain, although the RDT zone and the whole Agricultural Reserve is a range of flat to gently rolling. T. 22-24.

Mr. Pugh described the properties adjoining the subject property. To the north, there are two parcels. The parcel fronting on Peach Tree Road is approximately 10 acres.

The back parcel is approximately 20 acres. Both are used for typical farm operations. T. 24-25.

To the south, there are two residential properties that are slightly smaller than those bordering the northern property line. The property fronting the road on the south side is approximately 5.5 acres and the property to the rear is approximately 6.6 acres. T. 24-25.

To the southeast of the subject property across Peach Tree Road is Bucklodge Conservation Park. To the northwest is a parcel which fronts on Route 109 that is about 154 acres. T.24-25.

Mr. Pugh testified that he has done appraisals in the Agricultural Reserve portion of the County for mortgage lending and for several types of easements. He recently prepared a report for the County's Building Lot Termination Program. T. 25-26.

With regard to airstrips, Mr. Pugh is aware of the Davis Airstrip located in Laytonsville. It has 15-17 airplanes that pay for takeoff and landings and is the most notable airstrip in the Agricultural Reserve. He also knows of the Waredaca Farm near Sunshine which was utilized by the father of the current owner for a number of years. It closed around 2000 when the father passed away. He also obtained historical information on Roberts Farm located off of Turkey Foot Road in North Potomac, Flying M Farm along Old Hundred Road. He believed that the latter had ceased operations in the mid-1990's. T. 26-27.

He stated that there was limited data on the impact of the airstrips on property values. There were two sales of land that were adjacent to the Davis Airstrip, the first being around 2004. The price paid was consistent with the market value of agriculturally

zoned land similar to Dr. Gillespie's property. The second was in 2008 that was sold at what was considered to be market value. According to Mr. Hugh, no detrimental value or stigma applied to these properties because of their proximity to Davis Airstrip. T. 26-27.

He testified that he also researched an airstrip located on the Roberts Farm near Turkey Foot Road. The father and son used the airstrip until approximately 1998. He spoke with Mr. Wolfard who told Mr. Pugh that the sale of homes in the area was consistent with market value. While the data is limited, in his opinion the market data he was able to research did not support any adverse impact of the airstrips on adjacent property values. 27-29

On cross-examination, Mr. Pugh testified that the two sales at Davis Airport were sales of agricultural undeveloped and unimproved properties. T. 30. The size of the Flying M Farm on Old One Hundred Road was 75 or 79 acres; he did not know how far the airstrip was from the two residential property sales to the north. The Roberts Farm was around 180 acres. The first phase of development reduced the total area to around 115 acres, and then the remaining land area, including the airstrip, was sold in 2003-2004. He did not know exactly how close the airstrip was to the nearest single-family homes. The Waredaca airstrip was located on approximately 190 acres and the nearest single family homes were located on the other side of Damascus Road about 300-400 yards away. T.30-33.

Mr. Pugh had not observed Dr. Gillespie's aircraft during take-off and landing. His opinion is based on the fact that there would be only two round-trip flights per week. He had not analyzed the impact of more frequent flights. He was not aware of the provision in the Montgomery County Code requiring a property owner to disclose that

the property is within five miles of an airport. T. 36-37. The Roberts Farm airstrip was operating when the homebuilder bought properties roughly 200 yards away. T. 33.

3. Dr. Robert Q. Gillespie:

On recall, Dr. Gillespie testified that upon request to Mr. Krozack of the MAA, he was provided with a list of properties consisting of 40 or fewer acres which contained private airstrips. He has flown into 10 or 20 farm airstrips and some are adjacent to horse or cattle farms. T. 40-42. At the Carroll County airport where he keeps his planes, there are horses at the north end of the field. One must fly over them on departure and landing. There is another airport at Frederick County which has a large cattle operation at the north end of a field. T. 42-43. He also stated that he would be willing to abide by a condition of approval or record a covenant against the property limiting the operation of the airstrip to two flights per week.

4. Ms. Carolyn Laurencot:

Ms. Laurencot testified that she and her husband own the property bordering Dr. Gillespie's southern property line. The two properties share about 1,000 feet of property line and the airstrip is located about 50 yards from their pasture and 150 yards from her home. T. 49.

When Dr. Gillespie lands his plane, it appears to her that the plane is directly aimed at her home. She is terrified to see a low-flying plane descending and heading for her home. When she first saw the plane, she ran to get her dogs and went to the far side of her property to get out of the path of the plane. The plane then appeared to change course and fly parallel to her property before landing. T. 49-50.

The airplane generates loud noise which is distinctive from other machinery noise in the neighborhood. Dr. Gillespie stores his plane on the southern part of his property near her property. When he starts his plane at this location, the noise persists for several minutes and is quite loud. She hears the noise in her upstairs bedroom which is on the opposite side of the house from the plane. She finds the noise highly objectionable. T. 50.

She also believes that her property will be de-valued because of the airstrip. Her property is in the epicenter of the five-mile radius that must disclose the presence of the airstrip to potential purchasers. She believes that few, if any people with children or livestock would buy property next to an airstrip and that common sense dictates that the law requiring disclosure of an airstrip is in place because people are not willing to live in the proximity of the airport. T. 53.

On cross-examination, Ms. Laurencot testified that her home is in the southwestern part of the property adjacent to the flight path of the aircraft. When she first saw the plane, she was sitting on her deck and saw the plane approaching from the northwest. It appeared that the plane was heading right for her house, but then it appeared to straighten out and head towards his airstrip. She had solicited opinions on the airstrip from some community associations including the Boyds Civic Association and the Agricultural Preservation Advisory Board. The area where she and her husband pasture their horses adjoins Dr. Gillespie. T. 75-78. When the plane takes off, it parallels her property beyond the end of the airstrip. T. 79.

5. Mr. Robert Shoemaker:

Mr. Shoemaker, the husband of Ms. Laurencot, qualified as an expert in raising and training polo ponies. He testified that he has lived on that property since 2003. He works as a cancer research scientists at the National Cancer Institute, but also trains polo ponies at his property. T. 81-83. He agreed with his wife's testimony that the airstrip would devalue the property and that he found the use objectionable. T. 84.

The horses are primarily in two pastures in the middle of the property. Other than an area around his house, approximately 80% of the property is in horse pasture. T. 85. The horses graze along the entire approximately 1,000-foot they share with Dr. Gillespie. T. 85. He testified that the sudden appearance of the aircraft could spook the horses and lead to injury to anyone working with them. When there are startling devices that make noise, that can spook a horse. Even the appearance of a plane, particularly to a horse that's never seen one before, offers the potential for spooking the horse and leading to injury. T. 86. While his concern is primarily for the safety of the rider, a horse can also cause injury to itself when spooked. T. 86. He and his wife ride, friends and neighbors ride, and in the spring he hires people to exercise the horses when he is unable to do so. T. 86. The same concern could apply to someone leading the horse because in this case the plane is very close, very loud and if it appears without warning, there's a risk. He would not purchase the property for use as a horse operation if the airstrip were in operation. T. 88.

On cross-examination, Mr. Shoemaker stated that he was aware of a letter from the owner of the Waredaca Farm stating that the airstrip located thereon did not impact horse operations on the farm, but didn't know details about its operation, including

distance of the horses from the airstrip. T. 92. He heard testimony that the Waredaca Farm was approximately 190 acres. T. 95. The details of the horse operation could also matter, including the age of the horses. Younger horses tend to spook more easily than older horses. T. 95-96. He did not know of any injuries that had been sustained by horses at his property during the takeoffs and landing that had already occurred. T. 93. He didn't feel that advance notification of flights would be adequate because he was not always at his property. T. 94.

6. Mr. Wayne Six:

Mr. Six qualified as an expert on real estate appraisals. T. 103. He appraised both the Laurencot/Shoemaker property and the adjoining property along Dr. Gillespie's southern property line.

He stated that the Shoemaker property is a panhandle or flag-shaped lot that comes back to approximately 4 fenced acres. He physically inspected both properties. T. 104-105. He testified that, in his opinion, the value of Ms. Laurencot's and Mr. Shoemaker's property would lose 8% of its current market value or approximately \$43,000.00. The property adjoining the southern property line and Peach Tree Road would lose 10% of its value or \$53,000.00. T. 106. If the aircraft operated more frequently than twice a week, he believed the value of the Shoemaker/Laurencot property would decline by 12% and the other property by 14%. T. 106.

In order to evaluate the market impact of the airstrip, Mr. Six testified that he did a "before and after" appraisal. When determining diminution in value, the first step is to determine if the proposed use will impact property values negatively. The means of determining that is to appraise the current value and the value as if the use were in

operation. T. 107. In some cases, a particular proposed use may not have a negative impact. T. 107.

Uses which typically cause negative impacts on market value include power lines and highways. Rather than guessing at the diminution in value caused by a proposed use, he then applies an “extraction”. T. 108. An example of this methodology was a house where he used an existing sale of a house located 50 feet from a highway. He then compared that sale to a sale of a house that had no nearby highway and found that there was an approximately 11% price differential between the two prices. T. 108-109. There are many good examples of certain uses which cause a negative influence, such as dog kennels, cell towers, power lines and pig farms. T. 109. This yields a quantifiable methodology for measure the loss in value of properties impacted by certain uses. T. 110.

There were some portions of the Laurencot/Shoemaker’s house Mr. Six opined would be particularly impacted by the airstrip. T. 111. They constructed a \$100,000 addition on the house to frame their view toward the rear of the property in which Sugarloaf Mountain was visible. That type of view, and the quiet, peaceful area is why people move toward that location. There is value in the barn and fencing because of the properties use as a horse operation. The horse operation abuts the common property line and horses can go right up to the property line. Upon landing, the plane has to slow down and get low to the ground in an area near the fence line. T. 113-114. People in the house are going to have to look at the plane landing and taking off. T. 114. He felt that the proximity of the airstrip to the property line in conjunction with the County ordinance

requiring disclosure of the airstrip to potential buyers would also devalue the property. T. 116.

He testified that Dr. Gillespie's expert appraiser, Mr. Pugh, did not do as thorough an analysis of the impact of the airstrip because Mr. Pugh only prepared an "opinion" letter as opposed to a full appraisal. T. 117. He stated that he arrived at the percentage of devaluation based on information he has collected relating to the impact of certain uses, or negative external factors, such as power lines. T. 117. He is able to compare different negative external uses to determine a valid percentage by which to reduce its market value without the external negative factor. T. 119.

He was unable to find any real data on airstrips, particularly ones which are only 60 yards away. In cases like that, he uses examples of negative external factors which he believes are in the same category as the particular use proposed. T. 120-121. He was not able to use the two parcels of agricultural land near the Davis Airport as a comparison of negative impact because he didn't have sufficient information as to the highest and best use and because of the large size of the property. T. 121. He did not believe that a typical purchaser would pay the same amount for a piece of property with an airstrip in as close proximity as in this case as the same property without the airstrip. T. 122. The devaluation was a direct result of the proximity of the airstrip to the property.

On cross-examination, Mr. Six testified that he does some work in the northern areas of Montgomery County, such as Dickerson and Boyds, but his primary work is in Frederick County. He stated that with "external obsolescence", the location really doesn't matter because the principle applies wherever the property is located. He has done work with two farms, does a lot of apartment buildings and he likes to do historic

buildings because he's on the Boyd landmark foundation. Last year, his firm did about 2,050 appraisals. He has done recent appraisals in Montgomery County. T. 125. He characterized the area as "suburban because of its proximity to Washington, D.C., but had no problem characterizing it as rural. T. 126. He stated that he did not know the maximum permitted density in the RDT Zone, but assumed that the two properties conformed to the zoning. T. 126-128. He did not have any data specifically related to the impact of airstrips, so he applied data from other uses which he felt were in the same category as far as negative impact. He compiles data relating to negative external uses. T. 129. He did not extract or deduct value from the proposed airstrip use because of lighting, equipment or environmental issue. He felt that the impact of the airstrip was primarily due to its proximity to the adjoining properties along the southern boundary with Dr. Gillespie's property. T. 130.

He stated that he was aware of the other airstrips referred to by Mr. Pugh. He did not do any investigation there related to the impact of the airstrip on residential development. He felt that the sale of property near Robert's Farm wasn't determinative of the airstrip's impact because of the proximity of this airstrip to the two properties. T. 132. He has never done an appraisal of an airstrip or property surrounding one. The particular external factor that he applied to extraction from this property was the proximity of the airstrip to both properties. There is no difference between comparing an airstrip in close proximity than a road or tower or any other negative. T. 137. The intensity of the use would also affect his opinion. T. 137. Examples of factors that would increase the airstrips negative affect would include closer proximity, more trips and bigger planes. T. 138. Pavement of the runway and physical changes to the property

would also make it more noticeable. The proximity of the airstrip to the property line was the largest negative factor, however. T. 142.

Mr. Six also testified that noise from a tractor would not be the same as that from an airplane landing because the latter could spook animals. Even though the property was not in the flight path of the airplane, he felt that it would negatively impact property values because it is going to alarm animals and anyone wanting to buy the property. T. 149. He did not extract as high a percentage from the airstrip as he would have for external negative factors such as a dump truck. T. 150. He stated that the row of Leyland Cypress does provide screening for the Poch property at the present time, although this screening may be temporary due to pest infestation. T. 150-151. Dr. Gillespie's airstrip has more impact than elsewhere in the RDT Zone because it's so close to these two properties. T. 150.

Mr. Six testified that he is licensed by the State of Maryland as a real estate appraiser and the appraisal standards would be the same whether in Montgomery County or Frederick County. T. 153. If the property conforms to the standards of the zone, the exact standards of the zone are not relevant. T. 154.

7. Mr. Charles Grimsley:

Mr. Grimsley qualified as an expert in land planning and engineering. T. 157. He testified that if the airstrip could be located further from the southern property line it would have less of an impact and that the proximity of the airstrip to the property line was a non-inherent adverse condition. T. 161. Because of the location, there is a greater noise impact on the properties closest to the airstrip. T. 161. Nor is the use compatible with the character of the neighborhood or compatible with adjoining properties. Both

Environmental Planning Staff and M-NCPPC community planning staff recommended denial because they did not feel the proposed use was compatible. T. 162. Ms. Laurencot and Mr. Shoemaker found the use wasn't compatible because of the visual impact of the plane, as did Mr. Six. T. 162. No similar uses in the vicinity have been identified. T. 162.

The use changes the character of the neighborhood because it brings a new adverse impact to the adjacent property. The impact is adverse due to the noise; the frequency of flights related to the intensity. The general character of the existing neighborhood is a rural environment permitting low density residential uses and encouraging agricultural uses. He believed that the physical impact and noise from the aircraft were adverse impacts from the proposed use. This effect is different than seeing aircraft flying high above the ground because it's in very close proximity to the neighbors. T. 169. There could be a different large piece of property where the use might be appropriate. T. 171.

On cross-examination, Mr. Grimsley testified that the length and width of the airstrips proposed was not unusual. He was aware that the properties adjoining to the south were not in the direct flight path. T. 172. He had not been asked to look at any other location on the property where the airstrip could have been placed. T. 175. There is nothing topographically unusual Dr. Gillespie's property compared to other properties in the RDT Zone. His assessment that the use has a non-inherent adverse impact has been based on the fact that the noise exceeds the County's Noise Control Ordinance. T. 176-177. Other noises, such as farm equipment, may exceed the noise standards as well, but they are permitted by right. T. 177. The approach flight path does have an impact or

potential impact on the properties as well and location of a proposed use may be considered a non-inherent impact. T. 178-180.

He further testified that the topography of Dr. Gillespie's airstrip influenced the location of the airstrip at the location proposed. He testified that a larger property could provide additional buffering of the airstrip from adjacent homes. T. 189-191.

8. Ms. Delores Milmoie:

Ms. Milmoie testified on behalf of the Audubon Naturalist Society and qualified as an expert in conservation of environmental resources. She was appointed in 2000 to serve on the Legacy Open Space Advisor Working Group and she still serves on the group. They discuss properties which have high resource value. T. 200.

Ms. Milmoie testified that Bucklodge Conservation Park consists of 215 acres the first purchase for the Legacy Open Space program in 2000. Prior to the County's purchase, the owner proposed to develop it as a golf course. T. 201-202. The County stepped in to purchase the property to avoid its development and to use it for a conservation park. It is entirely forested and it contains the head waters of Bucklodge Branch. It is also the ground water recharge area for three different drainage areas in the Upper County. T. 201-202. A conservation park is a park with very low intensive usage. Hiking and horseback trails are located within the park. The Legacy Open Space Program has since saved another parcel of a farm to have a connecting swath of parkland from Black Hills to Bucklodge Park to increase the value of the park as a conservation corridor. T. 202.

Ms. Milmoie testified that Dr. Gillespie's property is located immediately across Peach Tree Road from the entry into the trail system. T. 202. While there are smaller,

grandfathered lots which existed before 1980, it is also an area which is very, very sparsely developed. T. 203. Were the airstrip located on a larger farm with greater setbacks, she believes that it would not be as objectionable. T. 204. She felt that the Vision Division should have placed additional emphasis on the airstrip's proximity to the park when they determined the airstrip was not compatible with the surrounding neighborhood. T. 203.

Ms. Milmoie also testified that she personally knew the owners of the Roberts Farm and that the farm was ultimately zoned residential; it is not located in the RDT zone. T. 204. According to Ms. Milmoie, when the first part of the residential subdivision went in the airstrip was hardly used and people knew that that it would eventually be developed residentially. T. 205. The Roberts Farm airstrip is distinguishable from this airstrip because it was never intended to be adjacent to residential development. T. 205.

She believes that the incompatibility stems from the airstrip's proximity to both the dwellings to the south, impact on the horse training facility there, and its proximity to a large 215-acre regional conservation park where people come to experience the peace and quiet of the agricultural zone in Montgomery County. T. 206. The impact on the park stems both from the visual and noise impact of the plane. T. 206.

9. Ms. Anne Sturm:

Ms. Sturm testified on behalf of the Sugarloaf Citizens Association. T. 210. The Association was formed in 1973 to represent citizens in what is called the "Up County" or western Montgomery County, Poolesville toward the Frederick County line and in southern Frederick County who had no organization to represent them in two particular

land use issues affecting the area. There is a mailing list of 240 people and about 141 people who are eligible to vote. She submitted a list of persons within 5 miles of Dr. Gillespie's property who were members of the Association and had authorized her to speak on their behalf. T. 210-215.

Ms. Sturm testified that, in her opinion, noises generated by agricultural uses could be compared to those generated by the aircraft. According to Ms. Sturm, the purpose of the Ag Reserve is to create a rural agrarian atmosphere suitable for the raising of livestock and crops. Noises from farm machinery are compatible with this intended purpose. T. 214.

Ms. Sturm stated that if the property were large enough that you could locate the airstrip far enough away from the property line that it would not result in noise violations, it might be acceptable. T. 216. In her opinion, the airstrips elsewhere in Maryland shouldn't be used to evaluate the compatibility of this airstrip because they may be located in different types of zones. T. 216. Ms. Sturm submitted photographs of some of some of the airstrips into the record. T. 218; Ex. 111. The Hidden Hills Airport in Dorchester County appears to be totally surrounded by farm fields. T. 218. The vicinity of the Flying Acres Airport in Queen Anne's County also looks very remote and very agricultural. T. 218. The Deerfield Airport in St. Mary's County also appears to be surrounded by large farms, but it appears very remote compared with the subject property. T. 219. The West St. Mary's Airport looks more remote than the others previously listed. T. 219.

She did not feel that these airports served as precedents for the compatibility of the subject proposal because the area along Peach Tree Road consists of a scattering of

either very large farms and smaller parcels created before the Ag Reserve and the minimum density of 25 acres per dwelling unit was established.. T. 219-220. There are approximately 6 parcels very close to airstrip which is not the case in the photographs of airstrips located in other counties. The subject airstrip is distinguishable from those because it is in close proximity to a residential area. T. 220.

Ms. Sturm submitted a page from the website of company called “International Air Charter Maryland” which listed Dr. Gillespie’s airstrip as well as others submitted by Dr. Gillespie. T. 220-221. This concerned her because it raises the potential that once the airstrip is approved, the intensity of the use may increase. Without limitations on the amount of the use, number of flights, the size of the aircraft, the incompatibility of the use could be made worse. T. 222. In addition, the County law requiring disclosure of the existence of an airstrip to potential buyers concerns those members of her organization which live within five miles of the property. T. 222. In her opinion, the law underscores the incompatibility of the proposed use with the Agricultural Reserve as a whole. T. 222. She believes that locating an airstrip on the subject property would potentially devalue the property. T. 223.

Ms. Sturm’s objections to the proposed use related to the violation of the Noise Ordinance, the potential future intensification of the use and the downward pressure on property values both in the vicinity and throughout the Agricultural Preserve. T. 223.

10. Dr. Robert Gillespie (on rebuttal):

On rebuttal, Dr. Gillespie testified that he follows a light path on takeoff and landing. When departing from the west, he flies over the off the airstrip, over his property and departs toward Rte. 109. At no point does he fly over adjacent properties

with residences on them. He has only taken off toward the east over Bucklodge Park one time and he does not fly over any residential properties in that direction either. T. 230.

The same is true on landing. At no point does his flight path take him over residential properties. It would be physically impossible for him to fly towards Ms. Laurencot's house and then curve as she described. There is no reason for him to come in on such a flight path. T. 230.

He also testified that he could submit Google Earth photographs of at least 10 airports that he's actually flown into, some private and some public, which literally have houses right up and down the runway. T. 231.

11. Mrs. Kay Poch:

Mrs. Poch testified that she lives at 22610 Peach Tree Road. She lives 65 yards from the airstrip. At one end of Peach Tree Road is Barnesville School. It's a private school and all school buses use the road. T. 237. Bicyclists and walkers also use the road which is a rural rustic road. At the end of her driveway, the road is very narrow, about 16 feet wide, with very little shoulder. T. 237-238.

She lives next door to the subject property and she requests that the special exception be denied. The neighbors will be exposed to noise which would violate County law. She did not know how the limitations on the use would be enforced because the County is not able to limit the use. According to the testimony from the MAA officials, they are unable to enforce flight limitations. The Planning Board based their recommendation on inaccurate information and therefore it should be ignored. T. 238-239.

She is concerned that future property owners may have larger planes the property which would make noise and safety concerns even worse. T. 239. She has safety concerns about aircraft landing less than 65 yards from her property. Should he have problems with takeoff and landing, he could crash into her house, her yard and injure people on Peach Tree Road. T. 239.

She also testified that the airstrip would reduce the property value of her home which she has lived in for 40 years. T. 239. The 10% reduction included in Mr. Six's appraisal makes perfect sense to her because no one would want to move next to a use most people consider being a nuisance. T. 240. According to Mrs. Poch, she will be hit twice—her property value will decrease and it will take longer to sell her property. She agrees with the Vision Division's interpretation of the zoning ordinance because the purpose of the Agricultural Reserve is to preserve agriculture and not private recreational use. T. 240. She didn't think that for the sake of pleasurable activity a recreational use should devalue and risk damage to neighbor's property. She felt that the airstrip would forever change the character of the area for the worse and her home in particular. T. 241.

12. Ms. Anne Cinque:

Ms. Anne Cinque testified that one of the main uses of Bucklodge Forest is horseback riding on trails partially created by the County. The park is just across the street from the proposed airstrip and riders access the park from Peach Tree Road right along the airstrip. T. 242. She agreed with Mrs. Poch that the road at that point had a very narrow shoulder for horses to go creating problems if the horses jump or bolt at that location. T. 242.

She rides at the location several times a week. There are also several riding clubs in the area. She believed that there was approximately a 95% change that her horse would bolt upon seeing the aircraft . T. 242. She agreed with Dr. Gillespie that horses regularly housed next to the airstrip would acclimate to the impact, but that this would not apply to the horses entering Bucklodge Park. T. 243. She felt that allowing an airstrip next to riding trails is an accident waiting to happen.

13. Ms. Caroline Taylor:

Ms. Taylor testified on behalf of the Montgomery Countryside Alliance. T. 243. The Alliance has worked to promote and protect the landscape and bolster food production within Agricultural Reserve for a little over a decade. T. 245. The Alliance is often asked to defend certain quality of life issues within the Reserve, such as cell towers, sub developments, and landscaping proposals because of their site-specific importance but also because they seek to promote a balance of uses. T. 245. She recently testified in a special exception case involving a landscape contractor which proposed truck traffic within 40 feet of neighboring property. The Hearing Examiner in that case denied the special exception which was ultimately upheld. T. 247. She believed that there were parallels between the two cases because she believes that the adverse impact of the airstrip at this location is different from other locations which it could be located because of its proximity to the neighboring property lines. T. 247. She did not think that the line of Leyland Cypress trees would sufficiently screen the visual or noise impact of an aircraft taking off. T. 248. She believed that noise was a basis for the denial of the landscape contracting business because of its impact on individual's daily activity and not because it violated the Noise Ordinance. T. 250.

14. Ms. Ellen Pearl:

Ms. Pearl testified that she lived “down the road” from Dr. Gillespie. T. 252. She works for the Montgomery County Public School systems teaching children that are unable to attend school because their sick. When she comes home from work, she comes home to a place where she seeks refuge from the stresses of the day. T. 252. She stated that at one point, she was learning to fly a plane and had visited a community composed of aviators who housed their airplanes in garages which opened onto a landing strip. T. 254. She believed the development was built in order to accommodate those who loved flying, in a place where everybody who was there wanted to be there. T. 254. It is possible that those individuals living near the Davis Airport lived there because they also wanted to do so.

15. Ms. Linda Pepe:

Ms. Pepe read a letter from the Commissioners of the Town of Barnesville into the record of the case. T. 257.

16. Mrs. Nancy Johnson Rattie:

Mrs. Rattie testified that her family owns two farms on which they raise beef cattle. One borders the property immediately to the north of Dr. Gillespie’s property which backs to Peach Tree Road. Both farms are less than one-quarter mile from the subject property. T. 259. A portion of their property is also on the opposite side of Peach Tree Road. T. 260. One farm extends to Old Hundred Road where her mother and father have lived since 1955. The other farm is south of Ms. Laurencot’s property and extends to both sides of Peach Tree Road adjacent to Bucklodge park.

Ms. Rattie testified that she first heard a “loud noise” from Dr. Gillespie’s plane in 2005 when it was coming toward her house. T. 262. She was upstairs in her house approximately one-half mile away and the noise was extremely loud. It was loud enough that she thought something was heading close to the house. She didn’t find the noise limited to takeoff and landing because people circle around to come into the airstrip the right direction. The plane is low and loud at these times. T. 262.

Even though Dr. Gillespie has indicated that he prefers to go out the opposite direction which may be less noisy, she is concerned because Peach Tree Road is a rural Road and is very narrow. She is also concerned about the height of the trees would eventually become an obstacle taking off because the MAA indicated it would not come back to check the trees. T. 263. She stated that Bucklodge is a hiking and horse park. She sees a lot of people walking there. Many people don’t realize how many people are in there because the parking for Bucklodge is on Slidell Road. She’s concerned for the safety of boy scouts which go into the parks and clean the paths. She’s also concerned because the end of the landing strip is just a handful of yards off Peach Tree Road. Dr. Gillespie also has to clear power lines and there are three houses in less than a tenth of a mile from the landing strip. She stated that there are a lot of residents in the proximity of the airstrip. T. 263-264. She felt that the airstrip in Darnestown was different because it was already there when homes were developed. T. 264.

17. Mr. Ronald Conley:

Mr. Conley’s property is approximately 1,000 feet northeast of the airstrip. He opposes the airstrip because it will create different problems for people. T. 266. When Dr. Gillespie was first practicing taking off and landing, he was out on his deck. His

sheep went into a panic. He stated that for animals to become acclimated to the noise it has to be constant—more than two times per week. T. 266. He believes that Dr. Gillespie's property will increase in value because the use would be unique at the expense of the value of the neighbor's properties. T. 266-267.

He doesn't think that the noise analysis presented reflects the impact of the noise from the aircraft. He barely hears Ms. Ratite's tractor from 1,000 feet away, but he does when Dr. Gillespie flies the aircraft, the noise "blasts down" and scares his sheep. T. 267. He believes that result is due to the lack of buffering from the sound above while the noise from the tractor is buffered by obstructions such as trees and hills. T. 267.

He stated that averaging the noise from the aircraft over time does not reflect the noise's impact. Averages conceal the extremes which are of most concern. T. 268. As an example, his wife can listen to music all day and not hurt her hearing. He can be in absolute silence all day and the last minute, shoot a 12-gauge shotgun and impair his hearing. T. 268.

He is concerned about enforcement of the conditions as well. At the least hearing, he heard that it was going to be the responsibility of the neighbors to report if the conditions are violated and he thought that that was unfair. T. 268-269. Finally, he's concerned that this type of use will proliferate in the Agricultural Reserve. T. 269.